LAW OFFICES
KOTEEN & NAFTALIN, L.L.P.
1150 CONNECTICUT AVENUE
WASHINGTON, D.C. 20036-4104

TELEPHONE
(202) 467-5700
TELECOPY
(202) 467-5915

January 19, 1999

Magalie Roman Salas
Federal Communications Commission
1919 M Street
Washington, DC 20554

Re: CC Docket No. 94-102, RM-814

Dear Ms. Salas:

Herewith transmitted are an original and four copies of its Application for Review of the Declaratory Ruling issued by the Wireless Telecommunications Bureau in the above-referenced docket on December 18, 1998.

In the event that there are any questions, or if the Commission requires more information, please contact the undersigned.

Very truly yours,

Peter M. Connolly

Enclosure

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Wireless Compatibility With E-911 Emergency Calling Systems	))	CC Docket No. 94-102 RM-814

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Summary

United States Cellular Corporation ("USCC") asks the FCC to overturn the rulings of the Wireless Telecommunications Bureau ("WTB") that: (1) the states need not provide wireless carriers with immunity for causes of action arising out of the provision of E-911 service ; (2) the states are not required under E-911 cost recovery rules to reimburse carriers for the cost of insurance policies covering their potential liability arising out of theprovision of wireless E-911 service; and (3) carriers cannot rely on state statutes to determine the "appropriate PSAP" to which to transmit E-911 calls.

The failure by a state to enact either liability protection for wireless carriers or provide for adequate cost recovery for insurance costs is an abdication of the state's responsibilities under the FCC's E-911 regulatory scheme and an imposition of an unfair and discriminatory cost on wireless carriers. FCC action is necessary to restore the regulatory balance between wireless carriers and the states created in the FCC's E-911 orders.

Moreover, the FCC should also make it clear that wireless carriers cannot be held liable for following state law in determining the appropriate Public Safety Access Point ("PSAP") to which to direct emergency calls.

The failure of the State of California and other states to provide for adequate cost recovery with respect to the costs of E-911 liability insurance warrants FCC preemption under Sections 253 and 332 of the Communications Act and may well also constitute a "taking" in violation of the Fifth Amendment to the U.S. Constitution.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Wireless Compatibility With E-911 Emergency Calling Systems	))	CC Docket No. 94-102 RM-814

APPLICATION FOR REVIEW OF
UNITED STATES CELLULAR CORPORATION

United States Cellular Corporation ("USCC"), pursuant to Section 1.115 of the FCC's Rules, hereby files its Application for Review of the Declaratory Ruling issued by the Wireless Telecommunications Bureau ("WTB")[1] on December 18, 1998.

USCC owns and operates cellular systems in 45 MSA and 100 RSA markets, including three California RSAs, and filed comments on the FCC's request for a declaratory ruling in this proceeding. Pursuant to Sections 1.115(b)(2)(ii) and 1.115(b)(2)(iii) of the FCC's Rules, the Declaratory Ruling involves both question of policy which have not been resolved by the Commission and the application of precedent which should be overturned.

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[1] In the Matter of Revision of the Commission's Rules to Ensure Compatibility will enhanced 911 Emergency calling Systems, CC Docket No. 94-102, RM-8143, Declaratory Ruling, (Wireless Telecommunications Bureau, DA 98-2572, released December 18, 1999 ("Declaratory Ruling").

Background

The public notice requesting comments in this proceeding[2] asked three questions:

1. Do carriers have an obligation to deploy wireless E911 service (Phase I) in California despite the fact that State statutes do not provide immunity from liability for the E911 service provided?

2. If carriers are obligated to deliver Phase I service without immunity from liability (either statutory or contractual), is the State required under the cost recovery rules to reimburse carriers for the cost of insurance policies covering their provision of wireless E911 service?

3. Regarding selective routing, what is meant in the Commission's E911 First Report and Order by the reference to the "appropriate PSAP"?

The WTB answered the first question by stating that it is powerless under current FCC rules to require the states to grant immunity. Accordingly, it ruled that wireless carriers must deploy E-911 service regardless of whether state statutes provide for immunity from liability for causes of action arising out of the provision of such service.

Concerning the second question, the WTB held that the FCC rules do not require that any particular item, such as liability insurance, "must be recovered in a specific manner, such as state

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[2]See, "Wireless Telecommunications Bureau Seeks Comments On Request For An Emergency Declaratory Ruling Filed Regarding Wireless Enhanced 911 Rulemaking Proceeding, Public Notice, released July 30, 1998.

reimbursement." Carriers may, according to the WTB, limit their liability by "contract" or "informational tariff," or simply charge higher prices to cover their insurance costs.

The WTB essentially refused to answer question 3, considering the determination as to the appropriate PSAP to which calls are to be transmitted in California to be a matter of California law, concerning which it "express[ed] no opinion."

INTRODUCTION

USCC respectfully submits that the Declaratory Ruling constitutes an abdication of the WTB's responsibility to the licensees it regulates and to the public interest, in that it will permit discriminatory actions by the states against wireless carriers of a type forbidden by the Communications Act. Accordingly, we ask that the FCC now overturn the rulings referred to above, by answering "Yes" to the first two questions and by ruling that wireless carriers may follow state statutes in determining the appropriate PSAP to which to transfer calls.

We believe that these issues will affect many states in addition to California and should appropriately be dealt with now.

I. The FCC Should Make it Clear to California and All States That Protection From Liability is a Requirement If E-911 Service is to be Offered

The WTB has now stated that it is powerless to require the states to grant immunity from liability from claims arising out of the provision of E-911 service and that carriers must await FCC action on pending petitions for reconsideration to secure such relief. Accordingly, USCC would reiterate the following arguments in support of such FCC action on this application and the pending petitions for reconsideration.

Under the FCC's Phase I requirements, since April 1, 1998, all wireless carriers have had to provide to the "appropriate PSAP" the telephone number of 911 callers and the location of the cell site or base station receiving a 911 call from any cellular telephone through the use of ANI and "pseudo-ANI" technologies.[3] However, pursuant to 47 C.F.R. §20.18(f), these requirements have not been applicable unless and until (1) the administrator of the designated PSAP has requested the service; (2) the PSAP is capable of receiving and utilizing the data elements associated

[3]Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Memorandum Opinion and Order, 12 FCC Rcd 22665 (1997) "1991 MO&O", further recon. pending.

with the service; and (3) a state mechanism for recovering the costs of the service has been created.

This type of regulation sets nationally applicable standards for E-911 service but makes those standards inapplicable until the states have taken all necessary actions to make the service viable. In essence, the FCC has told its licensees to prepare to offer E-911 service, but has also advised the states that unless they take their own responsibilities seriously, E-911 service will not have to be offered.

As this process moves forward, the FCC must continually monitor it to ensure that carriers and the states are continuing to meet their responsibilities within an evolving regulatory structure in which the goal, namely nationwide E-911 deployment with adequate cost recovery for carriers, remains the same, but the methods necessary to achieve the goal may have to change as the significance of certain matters becomes more apparent.

One such matter is the issue of immunity from liability for wireless carriers providing E-911 service under FCC mandate. USCC strongly believes that the obligation to offer E-911 service must be viewed in light of emerging conditions, especially a growing threat of liability litigation, and must be conditioned on an adequate limitation of such liability.

In its 1997 E-911 order, the FCC stated that it understood that carrier liability was a potential problem, and referred to its preemption authority but at that time declined to act. The Commission noted:

> "Contrary to petitioners' speculative claim that current state laws are not likely to provide wireless carriers with adequate protection against liability, the record indicates that state legislative bodies and state courts are developing their own solutions to liability issues. While we recognize that not all states currently provide specific statutory limitation of liability protection for wireless carriers, we believe that state courts and state legislatures are the proper forum in which to raise this issue, not the Commission."[4]

Also, in 1996[5] the Commission had expressed the belief that carriers might insulate themselves from liability contractually, at least with regard to their own customers:

> "We conclude that it is unnecessary to exempt providers of E-911 service from liability for certain negligent acts, as PCIA and U.S. West request. If E-911 wireless carriers wish to protect themselves from liability for negligence, they may attempt to bind customers to contractual language...."

11 FCC Rcd, at 18727.

The WTB has now reaffirmed these positions, maintaining that while there must be an E-911 "cost recovery mechanism" that the

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[4]1997 MO&O, 12 FCC Rcd, at 22732.

[5]In the Matter of Revision of the Commission's Rules To Ensure Compatibility with enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19876 (1996) ("1996 R&O").

Commission will not "specify the costs that must be recovered." (Declaratory Ruling, ¶14) and reiterating that carriers may "limit their liability by contract." (Declaratory Ruling, ¶11).

However, these arguments reflect a refusal to face the reality that many states have not enacted liability protection for wireless carriers and may never do so. In California, for example, the state legislature has persistently refused to enact any kind of E-911 liability protection for wireless carriers.

Further, as regards the possibility of a contractual escape from liability, USCC has been advised by California counsel that the state law does not favor contracts which seek to exempt one party from liability. And California is far from alone in this position. Moreover, as the Commission itself recognized in the 1997 MO&O (12 FCC Rcd at 22733), whatever their rights may be in connection with their subscribers, carriers certainly cannot contractually insulate themselves from liability for E-911 calls they carry for non-subscribers pursuant to FCC order.[6]

[6]In this connection, it may be noted by encouraging carriers to insulate themselves from liability contractually, the FCC gives carriers an incentive not to honor some customers' wishes to receive wireless service on a non-contractual basis.

As for "informational tariffs," also recommended by the WTB (Declaratory Ruling, ¶18), USCC is skeptical that carriers can so easily exempt themselves otherwise applicable from state law.[7]

While it would be preferable, from the FCC's standpoint, if the liability issue could be worked out at the state level, the fact is that in many states, including California, the largest in the nation, it has not been and the FCC therefore cannot any longer avoid consideration of the potential consequences of that failure.

As noted above, the E-911 regulatory structure is one of mutual and balanced responsibilities on the part of wireless carriers and the states. However, a state refusal to enact liability protection for wireless carriers is an act of irresponsibility, entirely at odds with this regulatory structure, which may pose a greater threat to the provision of E-911 service than inadequate or non-existent cost recovery for other wireless expenditures.

No cellular system should have to spend the time and incur the large expense of E-911 installation (with its obvious public interest benefits, including to persons other than cellular subscribers) if it has to face the threat of multimillion dollar

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[7]Moreover, many states have deregulated cellular service completely and have prohibited the filing of tariffs.

liability judgments if a particular emergency call, for whatever reason, from foliage to rain attenuation to dead batteries, does not get through. Allowing for such liability claims as a consequence of the enhanced public safety which E-911 will undoubtedly provide to most wireless end users, an enhancement which previously did not exist for anybody, is simply and obviously wrong.

Cellular carriers now have a duty to provide E-911 service within their markets. The service will of course be limited by the imperfections in signal coverage mentioned above, and also by inevitable problems in ANI technology development. Moreover, PSAP personnel do not always ask the correct questions of emergency callers or respond with the right degree of alacrity. Police and other emergency personnel sometimes get lost or otherwise fail to respond promptly after being called by the PSAP.

Wireless carriers should not be held liable for any of this, and should not be put to the time, trouble, and expense of having to explain to juries, for example, that a call did go through but the PSAP failed to respond, etc. any more than wireline telephone companies presently are or should be.

Thus, the FCC should act to preempt state laws by ruling that wireless carriers are protected from liability for any acts

other than willful misconduct or grossly negligent behavior. The grounds for preemption would be that for states to allow carriers to be held liable under any other circumstances would threaten the existence of E-911 service.

However, if the Commission is unwilling to involve itself with the preemption of state tort laws, it can certainly declare that wireless carriers need not offer E-911 service until they are free of the threat of liability for other than "willful misconduct" or "grossly negligent" behavior.

It is, we submit, the duty of the FCC to support the integrity of the E-911 process by stating clearly and unequivocally that the compelled provision of a public service should not have as a concomitant the real threat of bankruptcy.

The FCC understandably does not wish to involve itself in unnecessary conflicts with the states. However, if states, by their actions or inactions, make it impossible for FCC licensees to carry out their FCC imposed responsibilities, the Commission can either take preemptive action or, relieve licensees of those responsibilities.

Hence, the FCC should overrule the WTB and answer the first question in the affirmative.

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Hence, the FCC should overrule the WTB and answer the first question in the affirmative.

II. If the FCC Declines to Protect Carriers From Liability, it Should Rule That Reimbursement for Liability Insurance is a Necessary Part of Cost Recovery

If the FCC answers the first question, "yes," it will not have to deal with the second question, which asks whether the cost of liability insurance policies should be considered a "cost recovery" item which states must reimburse. Wireless carriers will not have to buy the insurance and the state, its taxpayers, and/or wireless customers will not have to reimburse the costs of such insurance, a positive outcome for all except those with a professional interest in litigation. If, however, the FCC answers the first question "no" it will have to consider the second question.

Though we stress that it is a "second best" solution, the answer to this question must also clearly be "Yes."

In the FCC's 1996 E-911 order, the Commission stated the basic principle that "[n]o party disputes the fundamental notion that carriers must be able to recover their costs of providing E-911 service"[8] If carriers are not freed of the threat of unforeseeable liability determinations, they will have to buy insurance to mitigate that threat, as do doctors, lawyers, and other professionals.

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[8] 1996 R&P, supra, 11 FCC Rcd, at 18722.

Clearly, insurance premiums will be a cost of providing E-911 service, since they would not have to be paid but for the provision of such service. Accordingly, the logic of cost recovery dictates that the states will have to reimburse wireless carriers for their insurance costs. Those costs will be large. In California, they have been projected by the state's E-911 Program Manager to be $50 million per year.

However, such reimbursement, while certainly a legitimate and indeed a mandatory item of cost recovery, will have various undesirable side effects. It will increase the costs of E-911 deployment and thus undoubtedly increase the surcharges which customers will pay to recover the costs of such deployment. It will also help to generate litigation, as wireless customers who may have a grievance in some way connected to an E-911 issue come to understand that they can obtain recoveries against deep-pocketed insurance companies, as well as their wireless carriers.[9]

Again, answering the first question in the affirmative would be preferable, but if the Commission wishes to avoid that

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[9]It is , we submit, very important that the FCC not, by its inaction, help to foster a situation in which wireless carriers are made targets for opportunistic litigation. At present, most people do not think to sue their wireless carrier if the response to an E-911 call is, in some way, inadequate. However, given time and legal ingenuity, they will, unless the door is closed at the outset.

conflict with the states it must face up to the issue of insurance reimbursement as a mandatory part of cost recovery.

III. The FCC Should Reiterate That The "Appropriate" PSAP is the One Designated by the States Through Their Statutes

Finally, the third question, dealing with the "appropriate PSAP" also involves an issue of state responsibility, in both senses of the word.

In the 1997 MO&O, dealing with E-911 issues, it is clearly stated that:

> "To the extent that the terms 'appropriate' and 'designated' PSAPs as used in the E911 First Report and Order, may be unclear, we wish to clarify that the responsible local or state entity has the authority and responsibility to designate the PSAPs that are appropriate to receive wireless 911 calls."'

1997 MO&O, 12 FCC Rcd, at 22713.

Given the crystal clarity of that allocation of responsibility, it is odd that the third question had to be asked at all. Evidently, it also grows out of California politics, namely an unwillingness on the part of the state legislature to shift the E-911 statutory responsibility from the California Highway Patrol, where it now resides, to other PSAPs, where the Highway Patrol wishes to shift it.

Again, the FCC cannot force states to act responsibly, but it can make clear that its wireless licensees should not have to do anything but follow state law with respect to the appropriate PSAP, in this case the Highway Patrol. Wireless carriers should not ever be put in the position of determining who the appropriate recipient of emergency calls should be. The state must designate the appropriate PSAPs, cellular carriers must make their best efforts to transmit calls to those PSAPs and to carry out their other E-911 responsibilities, and there the responsibility of wireless carriers should end.

It is easy to foresee the possibilities of litigation and potential carrier liability if wireless carriers are given the dubious "right" of determining the appropriate PSAP even in the face of an explicit state law designating the proper recipient of E-911 calls. Such an outcome would be totally undesirable.

The WTB's response to this issue in the Declaratory Ruling misses that point entirely. The WTB, in holding that it would not determine the validity under state law of a delegation of PSAP responsibility away from the Highway Patrol, missed an opportunity to declare that FCC licensees cannot be liable for following state statutes. If the FCC would make that ruling, wireless carriers could assert that they were obeying FCC policy if their actions were challenged in state court, thus protecting

themselves from groundless lawsuits. Also, armed with such a ruling from the FCC, wireless carriers would be better able to secure necessary changes in state law to clarify where E-911 calls should be sent, which would serve everyone's interest.

IV. The FCC must take Its Preemption Responsibilities Seriously and Act in This Proceeding

As noted above, the WTB has previously acknowledged that it could have acted to preempt California's failure to enact adequate protection for wireless carriers providing E-911 service, but found no reason to do so. USCC would submit that under the relevant statutory provisions, the FCC must now do so.

Section 253 of the Communications Act (47 U.S.C. Section 253) provides, in pertinent part, as follows:

> "(a) In General -- No state or local statute or regulation, or other state or local legal requirements; may prohibit of have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service...
>
> (d) preemption. -- If, after notice and or opportunity for public comment, the Commission determines that a state or local government has permitted or imposed any statute regulation or legal requirement that violates' subsection (a) or (b) the Commission shall preempt the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency."
>
> ... (emphasis added)

The FCC's preemption authority is also supported by Section 332(c) (3) of the Communications Act (47 U.S.C. Section 332(c)(3)), which provides in pertinent part, that:

> No state or local government shall have the authority to regulate the entry of or the rates charged by any commercial mobile service. ..."

Taken together, those provisions amount to requirements that (a) the states must not regulate the mobile service market structure or the rates charged by mobile service providers; and (b) that the states must otherwise treat mobile service providers fairly, by not taking or permitting any action to be taken which would preclude the provision of any service by a mobile (or other) service provider.

It is unlikely that any state would enact a law or take any other action which was overtly discriminatory against mobile service providers or would otherwise openly flout these provisions of the Communications Act. Accordingly, the FCC must look at disparities of treatment between mobile and wireline service providers under state law and to the probable effects of state actions in determining whether to take preemptive action.

Viewed in that light, the case for preemption here is very strong. In California, wireline telephone companies are protected from liability from causes of action arising out of 911 calls in the absence of gross negligence. This has the huge consequence of taking almost all problems arising out of wireline 911 calls out of the tort arena altogether. For no good reason, however, California has declined to provide similar protection to wireless carriers for E-911 calls, despite the increased

potential, owing to the technology involved, that such calls may not be received and reacted to as promptly as callers would wish.

The effect of this discrimination is clear, namely increased insurance costs and/or vastly increased potential liability costs for wireless carriers, if not now then certainly in the near future.

Such discriminatory cost impositions, which must eventually be recovered from customers, may certainly be deemed an impermissible restriction on wireless "rates" in violation of Section 332(c)(3)) and may also (in unusual but by no means unforeseeable cases) result in wireless carriers being driven out of business, in violation of Sections 253(a) as well as 332(c)(3) of the Act. For example, the imposition of such costs will severely impair possible wireline/wireless local competition, as wireless carriers will either have to raise rates or absorb the high cost of insurance payments as a cost of doing business while landline carriers, will be insulated from such costs.

The FCC should pay attention to those issues now, before the liability crisis begins, rather than after it is underway and should therefore take appropriate preemptive action.

V. California's and The FCC's Failure to Act Would Raise a Claim Under the "Takings" Clause of The Fifth Amendment

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use without just compensation."

USCC submits that the FCC's action in requiring wireless carriers to provide E-911 service without liability protection or a guarantee that liability insurance can be recovered through a state's cost recovery system raises a legitimate Fifth Amendment takings claim.

For governmental regulations that affect the use of private property, courts base their Fifth Amendment "takings" analyses on an inquiry which applies the following three factors: (a) the character of the governmental action; (b) its economic impact on the owner of the property; and (c) its interference with reasonable "investment backed expectations."[10]

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[10]See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-16 (1992).

Though generally "economic" regulations tend to be upheld against "takings" claims,[11] the special circumstances of this regulatory scheme will give a "takings" claim special force.

The FCC's E-911 regulations are intended to confer a public benefit, namely enhanced emergency wireless service to all Americans, including the hearing impaired, through the compelled services of private corporations. Under FCC regulations, wireless carriers must provide the E-911 services (including free calls) required by the FCC's "Phase I" and "Phase II" regulations by certain deadlines. Those services, which will include vastly improved location finding capabilities, will have considerable costs. However, as noted at the outset, the services need not be provided unless carriers receive requests for such services from PSAPs capable of transmitting E-911 calls and provided a state cost recovery mechanism is in place.[12] There is thus a necessary regulatory balance, which makes the overall structure a fair and reasonable one.

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[11]See, Penn Central Transportation Company et al., v. City of New York, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with the property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") Id., at 124.

[12]See E-911 Reconsideration Order, 12 FCC Rcd 22665 (1997).

However, a failure by any state to provide for liability relief or to consider insurance as a legitimate cost recovery item upsets this structure and throws an undue burden on wireless carriers. The costs of providing this public benefit are suddenly shifted to them, as they would be by a discriminatory tax.

Thus state and federal inaction combine to produce an unfair economic impact on wireless carriers which certainly interferes with their "reasonable investment backed expectations."

"Takings" analysis is fundamentally about fairness and it is difficult to imagine anything more unfair, in an economic context, than either a wireless carrier being held liable for an E-911 call (made for free) that does not elicit the appropriate response after that carrier has spent millions of dollars to enable one of its customers (or a non-subscriber passerby) to make that call or that carrier having to pay exorbitant insurance costs to forestall that eventuality without adequate provisions for cost recovery. In the latter case we submit that private property would have been taken for public use without just compensation.

In recent years the courts have proven willing to enforce the Fifth Amendment takings clause against the FCC.[13] We believe that they would be willing to do so again in this instance.

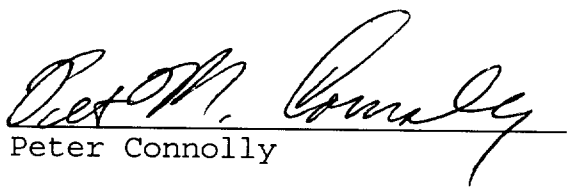
[13]See, e.g., Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

CONCLUSION

For the foregoing reasons we ask that the FCC overturn the Declaratory Ruling and rule either that the states must provide adequate liability protection for wireless carriers for carrying E-911 calls or that the states must consider liability insurance as a cost to be included in state cost recovery systems. We also ask that the FCC clarify that carriers cannot be held liable for following a state statute with respect to the appropriate PSAP to which E-911 calls must be transmitted.

Respectfully submitted,

UNITED STATES CELLULAR CORPORATION

By: 
Peter Connolly

Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 467-5700

January 19, 1999

Its Attorneys

Certificate of Service

I, Tracey W. Barton, a secretary in the offices of Koteen & Naftalin, hereby certifies that a true copy of he foregoing "Application For Review" was served on the following by First Class United States Mail, this 19th day of January, 1999:

Gerald Vaughan, Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, Dc 20554

Howard J. Symons
Mintz, Levin, Cohn Ferris, Glovsky and Popeo
701 Pennsylvania Avenue, NW, Suite 900
Washington, Dc 20004

Reuven M. Carlyle
Vice President - External Affairs
XYPOINT Corporation
2825 Eastlake Avenue, Suite 250
Seattle, WA 98102

Jay L. Birnbaum
Skadden Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005

Sylvia Lesse
Kraskinn, Lesse & Cosson
2120 L Street, NW
Suite 520
Washington, DC 20037

Philip L. Verveer
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Suite 600
Washington, DC 20036

Douglas I. Brandon
Vice President - External Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, NW
Washington, Dc 20036

Pamela J. Riley
AirTouch Communications, Inc.
1818 N Street, NW
Washington, DC 20036

Joyce H. Jones
AirTouch Communications, Inc.
One California Street, 29th Floor
San Francisco, CA 94111

John T. Scott, III
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Richard J. Quist, Jr.
4420 Rosewood Drive
4th Floor, Bldg. 2
Pleasanton, CA 94588

Robert S. Foosaner
Vice President and Chief
Regulatory Officer
Nextel Communications, Inc.
1450 G street, NW, Suite 425
Washington, Dc 20005

Carol L. Tacker
17330 Preston Road, Suite 100A
Dallas, TX 75252

John F. Raposa
Attorney
GTE Service Corporation
600 Hidden Ridge, HQE03J27
P.O. Box 152092
Irving, TX 75015-2092

Bruce Beard
13075 Manchester Road,
Suite 100
St. Louis, MO 63131

Gail L. Polivy
Attorney
GTE Service Corporation
1850 M street, NW, Suite 1200
Washington, DC 20036

Michael B. Day
Goodin, MacBride, Squeri,
Schlotz & Ritchie, LLP
505 Sansome Street, Suite 900
San Francisco, Ca 94111

Mark J. O'Connor
Piper & Marbury LLP
1200 19th Street, NW,
Suite 700
Washington, Dc 20036

Caressa D. Bennet
Bennet & Bennet, PLLC
1019 19th Street, NW,
Suite 500
Washington, DC 20036

William B. Barfield
1155 Peachtree Street, NE
Suite 1800
Atlanta, GA 30309-2641

David G. Frolio
1133 21st Street, NW
Suite 900
Washington, DC 20036

Robert M. Gurss
Wilkes, Artis, Hedrick & Lane
1666 K Street, NW #1100
Washington, Dc 20006

John Prendergast
Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, NW
Washington, DC 20037

Jim Conran
Chairman
AD HOC Alliance for Public
Access to 911
P.O. Box 2346
Orinda, CA 94563

Mary McDermott
Senior Vice President/Chief of Staff, Government Relations
Personal Communications Industry Association
500 Montgomery Street,
Suite 700
Alexandria, VA 22314-1561

Michael Altschul
Vice President and General Counsel
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, NW,
Suite 200
Washington, DC 20036

S.C. Wilkins, Chief
Information Management Division
California Highway Patrol
P.O. Box 942898
Sacramento, Ca 94298-0001

James R. Hobson
Donelan, Cleary, Wood & Maser
1100 New York Avenue, NW, #750
Washington, DC 20005-3935

Tracey W. Barton